

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY ROBINSON,

Defendant.

OPINION AND ORDER

11-cv-459-bbc
08-cr-152-bbc

On June 27, 2011, defendant Timothy Robinson filed a motion for post conviction relief under 28 U.S.C. § 2255 that I found to be timely but insufficient to make out a claim that he was in custody in violation of the laws, treaties or Constitution of the United States. In an order entered on July 6, 2011, I gave him an opportunity to allege additional information about why he believed that his trial counsel had provided constitutionally ineffective assistance.

After reviewing that order, I believe that it was a mistake. Defendant is contesting the validity of his custody, but he has done that once before. Therefore, his present filing constitutes a second and successive motion for which he must have prior certification from

a panel of the Court of Appeals for the Seventh Circuit. 28 U.S.C. § 2255(h). Defendant has not advised the court that he has obtained such certification, which means that this motion must be dismissed for lack of jurisdiction. United States v. Evans, 224 F.3d 670, 675 (7th Cir. 2000).

BACKGROUND

An indictment returned in October 2008 charged defendant with three counts of distributing crack cocaine. Defendant entered a plea of guilty to count 1 on January 7, 2009. He was sentenced to a term of ten years, the statutory minimum sentence. The sentence was entered on March 13, 2009. He filed a motion for post conviction relief on March 29, 2010, which was timely under the “mailbox rule” that applies to prison inmates. He contended that his counsel had failed to take an appeal of his sentence, despite defendant’s request that he do so, and that counsel had failed to undertake a proper investigation of the case against defendant. I set an evidentiary hearing on the first and dismissed the second one because defendant had not supported it with precise information setting forth what an investigation would have revealed.

At the evidentiary hearing, I concluded that defendant had asked his counsel to take an appeal of his case. I vacated the judgment and then reinstated it so that defendant’s appeal rights would be reinstated. New counsel was appointed to represent defendant on

appeal, which was unsuccessful. The court of appeals affirmed this court's decision on January 21, 2011. Defendant filed his present motion on June 27, 2011.

OPINION

It should have been clear to me on July 6, 2011, when I directed defendant to supplement his motion, that defendant cannot bring a new motion to challenge his conviction without obtaining certification to do so. Although his previous conviction was vacated, it was reinstated immediately, without any changes except to the effective date of the judgment. His present motion is directed to alleged shortcomings in his representation on the same charges that led to his conviction and the resulting judgment. This makes it a second motion requiring certification from the court of appeals that his motion either (1) contains newly discovered evidence that would be sufficient to establish by clear and convincing evidence that no reasonable factfinder could find him guilty of the offense or (2) is based upon a new rule of law that was previously unavailable to him and that has been made retroactive by the Supreme Court to cases on collateral review. 28 U.S.C. § 2255(h). Defendant has not shown that he has obtained such certification, which means that the court has no authority to consider it.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a defendant. To

obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). Defendant has not made a substantial showing of a denial of a constitutional right so no certificate will issue.

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one.

ORDER

IT IS ORDERED that defendant Timothy Robinson's motion for post conviction relief under 28 U.S.C. § 2255 is DISMISSED because it is a second motion that has not been certified by a panel of the Court of Appeals for the Seventh Circuit. Further, it is

ordered that no certificate of appealability shall issue.

Entered this 28th day of July, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge